Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of Petition for Declaratory Ruling Declaring That AT&T Phone-to-Phone Internet Protocol ("IP") Telephony Services are Exempt From Access Charges	WC Docket 02-361

Reply Comments of the Information Technology Association of America

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SUMMARY

The BOCs' argument is simple: they assert that "phone-to-phone IP telephony does not fall within the definition of an enhanced service, and, consequently, is not subject to the enhanced service access exemption." This assertion is plainly incorrect.

In the *Report to Congress on Universal Service,* the Commission ruled that it would continue to classify all forms of voice-over-Internet as information services until such time, if ever, as it is presented with evidence that demonstrates that a specific offering constitutes a telecommunications service. Rather than presenting the Commission with evidence that AT&T's voice-over-Internet service constitutes a telecommunications service, the BOCs impermissibly engaged in self-help. Because AT&T's voice-over-Internet service continues to be classified as an information service, under current law AT&T is not obligated to pay carrier access charges.

Contrary to the assertion of various parties, this does not constitute a special "exemption." The Commission has never "*exempted*" information service providers (formerly called enhanced service providers or ESPs) from paying carrier access charges. The carrier access charge regime was adopted, in the early 1980s, to ensure that competitive long-distance carriers would replace the long-distance-to-local subsidy flow that had existed within the Bell System monopoly. Because providers of information services are not long-distance telecommunications carriers, they have never been required to contribute to this subsidy. Instead of paying the same above-cost, per minute charges as interstate interexchange carriers, providers of information services – including voice-over-Internet services – compensate local exchange carriers by paying the same State tariffed business line rates as other non-carrier business users.

Even if the Commission were to conclude that, under existing law, AT&T's voice-over-Internet service constitutes a telecommunications service, AT&T would not be obligated to pay

carrier access charges to the ILECs. In the *Report to Congress on Universal Service,* the Commission made clear that, under existing rules, a provider of voice-over-Internet services that the Commission found to be a telecommunications service is not required to pay carrier access charges. Given the difficult issues presented by voice-over-Internet services, the Commission deferred the question of what pricing regime to impose on providers of such services to "future proceedings." Because the Commission has yet to adopt a regime governing the duty of providers of such services to compensate the ILECs for the use of their local facilities, ILECs cannot require AT&T to pay carrier access charges.

To the extent the Commission determines that policy considerations are relevant in this declaratory ruling proceeding, the soundest policy is to decline to extend the carrier access charge regime to voice-over-Internet services. The BOCs have provided no compelling reason for the Commission to alter its existing policy. There is no dispute that voice-over-Internet services still represent a very small portion of all interstate, interexchange traffic. Nor do the BOCs acknowledge – much less make any effort to address – the Commission's prior finding that the BOCs' local business line charges are fully compensatory. By contrast, there are a number of compelling reasons why the Commission should decline to extend the carrier access charge regime to voice-over-Internet services.

First, extending the carrier access charge regime to voice-over-Internet services would stifle development of these innovative new services by depriving providers of the efficiency benefits from the use of packet switched technology. Unlike a circuit switched telephone call, voice-over-Internet services do not require the establishment of a temporary dedicated connection between the originating and receiving parties. As a result, the duration of the call has

virtually no impact on cost. This advantage will be entirely lost if providers of voice-over-Internet services must pay above-cost, per minute access charges.

Second, extending the carrier access charge regime to voice-over-Internet services would be a significant "first step" towards regulation of the Internet. Inevitably, this will lead to calls for imposition of other forms of common carrier regulation on voice-over-Internet services – and, ultimately, on all Internet-based services. The end-result is likely to be significant erosion in the non-regulated status of the Internet, in direct contravention of congressional policy.

Third, extending the carrier access charge regime to voice-over-Internet services would require the Commission to devote significant resources to determine which "flavors" of voice-over-Internet services are telecommunications and, therefore, subject to carrier access charges. This task will become significantly more difficult as providers increasingly integrate voice-over-Internet services with interactive and data-oriented applications.

Finally, expanding the carrier access charge regime to voice-over-Internet services would have an adverse impact on U.S. international telecommunications policies. If the Commission were to extend the access charge regime to domestic voice-over-Internet services, it would be significantly more difficult for the United States to oppose proposals to subject international Internet traffic to the accounting rate regime.

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REPLY COMMENTS OF THE INFORMATION TECHNOLOGY ASSOCIATION OF AMERICA

The Information Technology Association of America ("ITAA") hereby replies to the comments submitted regarding the *Petition for Declaratory Ruling* filed by AT&T.[1]

INTRODUCTION

In its petition, AT&T asked the Commission to declare that, under *existing* law, the Bell Operating Companies ("BOCs") and other local exchange carriers cannot unilaterally impose carrier access charges on AT&T's phone-to-phone voice-over-Internet service. The BOCs, however, are seeking to use this declaratory ruling proceeding to fundamentally alter the existing regulatory regime applicable to voice-over-Internet services. Specifically, the BOCs ask the Commission to hold that: voice-over-Internet services are telecommunications services; these

[1] *See Wireline Competition Bureau Seeks Comment On AT&T's Petition For Declaratory Ruling That AT&T's Phone-To-Phone IP Telephony Services Are Exempt From Access Charges,* Public Notice, WC Docket No. 02-361, DA 02-3184 (rel. Nov. 18, 2002). *See also Wireline Competition Bureau Extends Deadline for Filing Reply Comments to Comments on AT&T's Petition for Declaratory Ruling That AT&T's Phone-To-Phone IP Telephony Services Are Exempt From Access Charges,* Public Notice, WC Docket No. 02-361, DA 02-3334 (rel. Dec. 3, 2002).

services are not subject to the so-called "ESP exemption"; and, therefore, providers of these services must pay carrier access charges. The Commission should decline the BOCs' invitation to expand this proceeding. Instead, the Commission should grant AT&T's narrow request.

As demonstrated below, under the Commission's *existing* rules:

- Until such time, if ever, as a local exchange carrier demonstrates to the contrary, the agency will classify all voice-over-Internet services as information services.

- Even if it were to find that certain voice-over-Internet services constitute telecommunications services, the Commission will not automatically extend the carrier access charge regime to these offerings.

Because the Commission has not made a finding regarding the regulatory classification of AT&T's voice-over-Internet services – much less determined that AT&T should pay carrier access charges in connection with these services – the Commission should declare that, under existing law, AT&T is not obligated to pay carrier access charges to the incumbent local exchange carriers ("ILECs") for use of their local facilities to carry AT&T's voice-over-Internet traffic. Therefore, AT&T can continue to compensate the ILECs for the use of their local facilities by paying State tariffed business line rates.

To the extent that policy considerations are relevant in this declaratory ruling proceeding, they militate in favor of preserving the *status quo*. Contrary to the BOCs' assertions, the current regulatory regime does not impose uncompensated costs on the BOCs. By contrast, imposition of carrier access charges – which, despite reform, remain above cost and inefficiently structured – on voice-over-Internet services would: stifle innovation; constitute imposition of common carrier regulation on Internet-based services, in contravention of express congressional policy; impose significant administrative burdens on the Commission; and undermine the United States' international telecommunications policies.

STATEMENT OF INTEREST

ITAA is the principal trade association of the computer software and services industry. ITAA has 500 member companies located throughout the United States, ranging from major multinational corporations to small, locally based enterprises. ITAA's members include a significant number of information (enhanced) service providers ("ISPs"), which have long been – and remain – critically dependent on telecommunications services provided by ILECs.

During the last three decades, ITAA (and its predecessor, ADAPSO) has participated actively in Commission proceedings governing the obligations of the BOCs and other ILECs to offer basic telecommunications services used to provide Internet and other information services on a just, reasonable, and non-discriminatory basis. In particular, ITAA has participated in each of the numerous Commission proceedings regarding the application of the carrier access charge regime to ISPs. ITAA has consistently urged the Commission to maintain its long-established decision not to extend the carrier access charge regime to ISPs. In recent years, ITAA has specifically addressed the issue of voice-over-Internet services in the comments that it filed in the Commission's *ILEC Broadband Non-Dominance, Universal Service*, and *Intercarrier Compensation* dockets.[2]

[2] *See, e.g.,* Reply Comments of the ITAA, *Federal-State Joint Board on Universal Service,* CC Docket No. 96-45 (filed May 13, 2002); Initial Comments of the ITAA, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33 (filed May 3, 2002); Initial Comments of the ITAA, *Developing a Unified Intercarrier Compensation Regime,* CC Docket No. 01-92 (filed Aug. 21, 2001); Reply Comments of the ITAA, *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92 (filed Nov. 5, 2001).

I. THE COMMISSION SHOULD REJECT THE BOCs' EFFORTS TO UNILATERALLY IMPOSE CARRIER ACCESS CHARGES ON AT&T'S VOICE-OVER- INTERNET SERVICE

The purpose of a declaratory ruling proceeding, such as the present one, is to determine the rights and obligations of specific parties under *existing* law and regulations.[3] As demonstrated below, under the Commission's current rules, AT&T's voice-over-Internet service currently is classified as an information service, which is not subject to the carrier access charge regime. Even if the Commission were to determine that AT&T's "phone-to-phone" offering constitutes a telecommunications service, however, AT&T is not currently required to pay carrier access charges.

A. Under Existing Rules, AT&T's Voice-Over-Internet Service is Classified as an Information Service and, Therefore, is Not Subject to the Carrier Access Charge Regime

The BOCs' argument is simple: they assert that "phone-to-phone IP telephony does not fall within the definition of an enhanced service, and, consequently, is not subject to the enhanced service access exemption."[4] This assertion is wrong on two counts. First, under current Commission rules, all voice-over-Internet services are classified as information services. Second, there is no "ESP exemption." Rather, because information service providers are not telecommunications carriers, they are not required to pay *carrier* access charges. Instead,

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[3] *See* 47 C.F.R. § 1.2.

[4] BellSouth Opposition to AT&T's Petition for Declaratory Ruling, at 2 (filed Dec. 18, 2002); *Id.* at 6 ("[P]hone-to-phone IP telephony is a telecommunications service."); Comments of Qwest Communications International Inc., at 6 (filed Dec. 18, 2003) ("AT&T's phone-to-phone IP telephony service is a telecommunications service subject to payment of carriers' carrier charges for access to local exchange switching facilities in the provision of interstate service."); Opposition of SBC Communications Inc., at 2 (filed Dec. 18, 2002); *see also* Opposition of Verizon, at 4 (filed Dec. 18, 2002) ("[U]nder the Commission's current construction of the [Communications] Act, phone-to-phone Internet telephony is a telecommunications service . . .").

information service providers compensate the ILECs for the use of their local facilities by paying the same State tariffed business rates as other commercial users.

1. AT&T's Voice-Over-Internet Service is currently classified as an information service

The BOCs' assertion that, under existing rules, AT&T's voice-over-Internet service is a basic telecommunications service is wrong. In the *Report to Congress on Universal Service,* the Commission specifically considered the regulatory classification of voice-over-Internet services.[5] While several commenters urged the Commission to rule that "phone-to-phone Internet telephony" services constitute telecommunications services,[6] the Commission declined to do so. To the contrary, the Commission concluded that while "the record before us suggests that certain 'phone-to-phone IP telephony' services lack the characteristics that would render them 'information services' . . . [w]e do not believe . . . that it is appropriate to make any definitive pronouncements in the absence of a more complete record focused on individual service offerings."[7]

The Commission's decision in the *Report to Congress on Universal Service* thus established the current regulatory regime: The Commission will continue to classify all forms of voice-over-Internet as information services until such time, if ever, as it is presented with evidence that demonstrates that a specific offering constitutes a telecommunications service. Following the issuance of the *Report to Congress on Universal Service,* the BOCs did *not* present the Commission with evidence that AT&T's voice-over-Internet service constitutes a

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[5] *See Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501, 11541-11553 (1998) ("*Report to Congress on Universal Service*").

[6] *Id.* at 11541 n.171 (Noting that several commenters advocated treating "IP telephony . . . as a 'telecommunications service' under the Act.").

[7] *Id.* at 11541.

telecommunications service. Instead, the BOCs resorted to "self-help" – effectively declaring AT&T's service to be telecommunications and then demanding that AT&T pay carrier access charges. The BOCs, however, lack the authority to "reclassify" AT&T's voice-over-Internet service. Only the Commission can do so. Because the Commission has chosen not to, the agency's determination in the *Report to Congress on Universal Service* remains the controlling legal rule. Under this rule, AT&T's voice-over-Internet service continues to be classified as an information service.

2. There is no "ESP exemption"

Because, under existing Commission rules, AT&T's voice-over-Internet service is classified as an information service, AT&T is not obligated to pay carrier access charges.[8] Contrary to the assertion of various parties, however, this does not constitute a special "exemption."

The Commission has never "*exempted*" information service providers (formerly called enhanced service providers or ESPs) from paying carrier access charges. The Commission adopted the carrier access charge regime in order to preserve the implicit subsidy regime between long-distance and local telephony services that had existed prior to the introduction of long-distance competition. In effect, the Commission imposed the burden of contributing to this subsidy – which, before the advent of competition, had been borne by the AT&T Long Lines Division – on competitive carriers that, after the introduction of competition, provided a comparable, circuit switched, interstate interexchange telecommunications service. Because providers of information services are not interexchange telecommunications carriers, they have

[8] *See id.* at 11544-45.

never been required to contribute to this subsidy.[9] Instead of paying the same above-cost, per minute charges as interexchange carriers, providers of information services – including voice-

[9] The Commission's 1983 *Access Charge Order* divided users of the local network into two categories: interexchange carriers and end-users. *See MTS and WATS Market Structure,* First Report and Order, 93 F.C.C.2d 241 (1983), *aff'd sub nom. NARUC v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984). End-users compensate local exchange carriers for their use of the local telephone network by paying a mix of flat-rate Federal end-user charges and State charges. Interexchange carriers, by contrast, are subject to the Commission's carrier access charge regime. *See generally Access Charge Reform,* Sixth Report and Order, 15 FCC Rcd 12962, 12965-66 (2000) ("*CALLS Order*") (The access charge regime was adopted "in lieu of" earlier agreements between the pre-Divestiture AT&T and "MCI and the other long-distance competitors" regarding payment for the use of the local network "for originating and terminating interstate calls."). The Commission's carrier access charge rules, first adopted in the 1983 Order, make *no mention* of ESPs – much less purport to "exempt" ESPs from paying carrier access charges. *See* 47 C.F.R. § 69.5(b) ("Carrier's carrier charges shall be computed and assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services"); *id.* § 69.2(m) (defining an "end-user" as any customer of an interstate or foreign telecommunication service that is not a carrier). Rather, from the beginning, the Commission has repeatedly and consistently concluded that ESPs are *users* of the telecommunications services, which – like a number of other end-users – connect jurisdictionally mixed private line networks to the local public switched telephone network. *See MTS and WATS Market Structure,* Order on Reconsideration, 97 F.C.C.2d 682, 711-22 (1983).

The Commission's treatment of ESPs stands in stark contrast to its treatment of resellers – which the agency has consistently classified as carriers. At the time it adopted the *Access Charge Order,* the Commission created an *express* exemption for resale carriers. *See id.* at 769 (reprinting former Section 69.5 of the Commission's Rules). The Commission subsequently eliminated this exemption based on its conclusion that "resellers of private lines . . . [should] pay the same charges as those assessed on *other interexchange carriers* for their use of these local switched access facilities." *WATS-Related and Other Amendments of Part 69 of the Commission's Rules,* Second Report and Order, CC Docket 86-1, ¶¶ 11-14, *reprinted in* 60 Rad. Reg.2d (P&F) 1542, 1548-49 (rel. Aug. 26, 1986) (emphasis added).

Because ESPs are end-users, they have always been allowed to pay the ILECs the same combination of Federal and State charges as other end-users with comparable network configurations. The Commission has repeatedly rejected proposals to extend the carrier access charge regime to ESPs. *See, e.g., Amendment of Part 69 of the Commission's Rules Related to the Creation of Access Charge Subelements for Open Network Architecture,* 6 FCC Rcd 4524, 4534-35 (1991) (rejecting claims that imposition of carrier access charges on ESPs would result in significantly lower charges to end-users); *Filing and Review of Open Network Architecture Plans,* 4 FCC Rcd 1, 167-69 (1991) (ESPs "will continue to be able to take local business lines, or other state-tariffed access arrangements, instead of federal access, in the same manner as other end-users."); *Amendment of Part 69 of the Commission's Rules Related to Enhanced Service Providers*, 3 FCC Rcd 2631, 2632-33 (1988) (terminating docket opened to consider whether to

over-Internet services – compensate local exchange carriers by paying the same State tariffed business line rates as other non-carrier business users.

B. Even if the Commission Were to Conclude that AT&T's Voice-Over-Internet Service is a Telecommunications Service, This Offering Still Would Not be Subject to the Carrier Access Charge Regime

Even if the Commission were to conclude that, under existing law, AT&T's voice-over-Internet service constitutes a telecommunications service, AT&T would not be obligated to pay carrier access charges to the ILECs for the use of their local facilities in connection with this offering. In the *Report to Congress on Universal Service,* the Commission made clear that, under existing rules, a provider of voice-over-Internet services that the Commission found to be telecommunications is not required to pay carrier access charges.[10] While the Commission stated that it "*may* find it reasonable" for such providers to pay carrier access charges in some circumstances, the agency recognized that imposition of the existing carrier regime on voice-over-Internet services would raise "difficult and contested issues."[11]

Given the difficult issues presented by voice-over-Internet services, the Commission deferred the question of what pricing regime to impose on providers of such services to "future proceedings." [12] While the Commission has raised issues regarding the regulatory obligations of

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extend carrier access charge regime to ESPs). The Commission's treatment of ESPs as end-users has been affirmed twice – first by the D.C. Circuit in 1984 and again by the Eighth Circuit in 1997. *See Southwestern Bell Telephone Co. v. FCC,* 153 F.3d 523, 541-44 (8th Cir. 1998); *NARUC v. FCC,* 737 F.2d at 1136-37. The Commission re-iterated its position in its 1998 *Report to Congress on Universal Service*, observing that "information service providers are not subject to regulation as common carriers" and therefore, are not required to pay carrier access charges. *Report to Congress on Universal Service,* 13 FCC Rcd at 11511 & 11552.

[10] *Report to Congress on Universal Service,* 13 FCC Rcd at 11544-45.

[11] *Id.* at 11545 (emphasis added).

[12] *Id.*

providers of voice-over-Internet services in several pending dockets, the Commission has yet to adopt a regime governing the duty of providers of such services to compensate the ILECs for the use of their local facilities. Thus, at the present time, there is no federal regulatory regime governing the charges that ILECs can assess providers of voice-over-Internet service deemed to be telecommunications for use of the local network. Therefore, even if AT&T's voice-over-Internet service constituted telecommunications, under current law, the ILECs have no basis to impose carrier access charges.

II. THERE IS NO POLICY JUSTIFICATION FOR *EXTENDING* THE CARRIER ACCESS CHARGE REGIME TO VOICE-OVER-INTERNET SERVICES

Because AT&T has asked for a declaratory ruling regarding its rights and obligations under *current* law, there is little reason for the Commission to consider the broader policy issues. Such matters are more appropriately considered in any future proceeding in which the Commission considers *changing* the applicable rules. For the present, the Commission should do no more than to declare that, under its current rules, AT&T is not obligated to pay carrier access charges in connection with its voice-over-Internet service. To the extent the Commission determines that policy considerations are relevant, however, the soundest policy is to decline to extend the carrier access charge regime to voice-over-Internet services.

A. The BOCs Have Failed to Provide Any Evidence That the Current Regime is Having an Adverse Impact on Their Operations

While the BOCs urge the Commission to extend the access charge regime to voice-over-Internet services, they completely fail to demonstrate that the current regime is having an adverse impact on them. There is, therefore, no basis to alter the current regime.

As an initial matter, there is no dispute that voice-over-Internet services still represent a very small portion of all interstate, interexchange traffic. In its petition, AT&T estimated that

"IP telephony service[s] . . . represent . . . between 1% and 5% . . . of interexchange calling."[13] The BOCs do not challenge this estimate. ITAA previously estimated that, "in the year 2000, the delivery of voice traffic over the Internet resulted in the loss of between $53 and $121 million in ILEC access revenues – about one-half of one percent of the $17 billion that the ILECs collected in access revenues."[14] Clearly, these relatively small sums are not enough to have a material impact on the incumbents.

Nor do the BOCs acknowledge – much less make any effort to address – the Commission's prior finding that the BOCs' local business line charges are fully compensatory. In the *Access Charge Reform Order*, the Commission rejected claims that requiring providers of information services to pay carrier access charges was necessary to ensure that the ILECs are fully compensated for the use of their local facilities.

As the Commission explained:

> ISPs do pay for their connections to incumbent LEC networks by purchasing services under state tariffs. . . . To the extent that some intrastate rate structures fail to compensate incumbent LECs adequately for providing service to customers with high volumes of incoming calls, incumbent LECS may address their concerns to state regulators.[15]

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[13] AT&T Petition at 27 (citing 2001 Probe Research Report).

[14] Reply Comments of the ITAA, *Developing a Unified Intercarrier Compensation Regime,* CC Docket No. 01-92 at 3 (filed Nov. 5, 2001). *See* HAI Consulting, Inc., *Local Telephone Companies: Banking the Benefits of the Internet* at 36-38. In many cases, sending voice traffic over the Internet does not result in the loss of ILEC access revenue. The vast majority of voice traffic sent over the Internet (perhaps as much as 85 percent) is sent to locations outside the United States. *See id.* Domestically, a significant portion of the voice traffic sent over the Internet represents traffic generated by lower prices that would never have been sent over the public switched network and, therefore, would not have generated any access charge payments. *See id.*

[15] *Access Charge Reform,* First Report and Order, 12 FCC Rcd 15982, 16133-34 (1997), *aff'd, Southwestern Bell Telephone Co. v. FCC,* 153 F.3d 523, 542 (8th Cir. 1998) ("*Access Charge Reform Order*").

The BOCs' concern, therefore, plainly is not ensuring compensation for their local facilities. Rather, the BOCs are seeking – yet again – to increase the size of the subsidy that they receive by requiring additional service providers to pay above-cost carrier access charges.

B. Extending the Carrier Access Charge Regime to Voice-over-Internet Services Would Have Significant Adverse Consequences

While the BOCs have failed to provide a compelling reason why the carrier access charge regime should be extended to providers of voice-over-Internet services, there are a number of reasons why the Commission should decline to do so.

Stifling of market development. Extending the carrier access charge regime to voice-over-Internet services would stifle development of these innovative new services. The Commission has repeatedly recognized that the carrier access charge regime is highly inefficient. For example, in the 1997 *Access Charge Reform Order,* the Commission stated that:

> [T]he existing access charge system includes non-cost-based rates and inefficient rate structures. . . . [T]here is no reason to *extend* such a system to an additional class of customers. . . . [ESPs] should not be subjected to an interstate regulatory system designed for circuit-switched interexchange voice telephony solely because [they] use incumbent LEC networks to receive calls from their customers.[16]

To be sure, the Commission's *CALLS Order* has eliminated some of the subsidies and inefficient rate structures that have long been a part of the Commission's carrier access charge regime. However, as the Commission has recognized, the *CALLS Order* created "a transition to a more economically rational approach to access charges" – not the "perfect, ultimate solution."[17] Therefore, the conclusion that the Commission reached in the *Access Charge*

[16] *Id.* at 16132-16133 (emphasis added).

[17] *CALLS Order,* 15 FCC Rcd at 12973-74.

Reform Order remains correct today: there is no justification to extending an "imperfect" regulatory regime to a new category of customers. Indeed, imposition of carrier access charges would deprive consumers of the efficiency benefits of packet-switched technology. Unlike a circuit switched telephone call, voice-over-Internet services do not require the establishment of a temporary dedicated connection between the originating and receiving parties. As a result, the duration of the call has virtually no impact on cost. The benefit of this efficiency will be entirely lost, however, if providers of voice-over-Internet services must pay above-cost, per minute charges for access to the ILECs' "last mile" facilities.

Regulation of the Internet. Extending the carrier access charge regime to voice-over-Internet services would be a significant step towards regulation of the Internet. In the Telecommunications Act, Congress adopted as a national policy "preserv[ing] the vibrant and competitive free market that presently exists for Internet and other interactive computer services, unfettered by Federal or State Regulation."[18] One of the most basic, and burdensome, forms of Federal common carrier regulation is the obligation to pay subsidy-laden carrier access charges to the ILECs. For that reason, the Commission recognized that its decision, in the 1997 *Access Charge Reform Order,* not to extend the carrier access charge regime to ISPs would advance the no-Internet-regulation policy adopted as part of the Telecommunications Act.[19]

If the Commission extends the carrier access charge regime to voice-over-Internet services, it would mark the first time that the Commission has applied a major common carrier obligation to services provided over the Internet. Inevitably, this will lead to calls for further expansion of traditional carrier regulation. For example, the Commission would doubtless be

[18] *See* 47 U.S.C. § 230(b)(2).

[19] *Access Charge Reform Order,* 12 FCC Rcd at 16133.

faced with demands to impose a range of other common carrier obligations – from universal service to rate integration requirements – on providers of voice-over-Internet services. After that, the BOCs and their allies are almost certain to renew their calls to apply access charges to a broader range of Internet-based services. The end-result is likely to be a significant erosion in the non-regulated status of the Internet, in direct contravention of congressional policy.

Administrative burden. In the *Report to Congress on Universal Service,* the Commission specifically noted that, in making a determination regarding the regulatory classification of voice-over-Internet services, it would be necessary to develop a definition of "phone-to-phone IP telephony" that "is not likely to be quickly overcome by changes in technology."[20] This would be a difficult – if not impossible – task.

Extending the carrier access charge regime to voice-over-Internet services would replace the current clear-cut regulatory distinction between regulated basic telecommunications services and non-regulated information services with a regime in which the Commission would be required to devote significant resources to determine which "flavors" of voice-over-Internet services are telecommunications and, therefore, subject to carrier access charges. This task will become significantly more difficult as providers increasingly integrate voice-over-Internet services with interactive and data-oriented applications. For example, the Commission would need to determine how to classify a "phone-to-phone" service that allowed users to carry on a real-time voice conversation while simultaneously editing a stored document, jointly accessing information from a website, or playing an interactive on-line game.

In *Computer I,* the Commission established a regime in which it was obligated to determine, on a service-by-service basis, whether the telecommunications component of a given

[20] *Report to Congress on Universal Service,* 13 FCC Rcd at 11544.

service "predominated."[21] By 1980, the Commission recognized that the rapid development of technology rendered this approach unworkable.[22] The Commission should act with great caution before going down that road again.

International considerations. Finally, expanding the carrier access charge regime to voice-over-Internet services would have an adverse impact on U.S. international telecommunications policies. In the *Report to Congress on Universal Service,* the Commission recognized the need to consider the international implications of any proposal to extend carrier access charges to providers of voice-over-Internet services.[23] In subsequent years, the U.S. Government has strongly opposed proposals, still under discussion in the International Telecommunications Union, to extend the international equivalent of carrier access charges – the above-cost and inefficient accounting rate regime – to international Internet traffic. If the Commission were to extend the access charge regime to domestic voice-over-Internet services, it would be significantly more difficult for the United States to oppose proposals to subject international Internet traffic to the accounting rate regime.

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[21] *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities,* Final Decision and Order, 28 F.C.C.2d 267, 276-79 (1971) ("*Computer I*").

[22] *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry),* Final Decision, 77 F.C.C.2d 384, 430 (1980) (subsequent history omitted).

[23] *See Report to Congress on Universal Service,* 13 FCC Rcd at 11545.

CONCLUSION

For the foregoing reasons, the Commission should *grant* AT&T's petition and issue a declaratory ruling stating that, under existing law: (1) AT&T's voice-over-Internet service is classified as an information service, and (2) the ILECs may not require AT&T to pay carrier access charges for use of their local facilities in connection with such services.

Respectfully submitted,

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